

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RICHARD KENNETH PULLEN,

Defendant-Appellee.

UNPUBLISHED

February 15, 2011

No. 298138

Bay Circuit Court

LC No. 09-010497-FH

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order granting defendant's motion in limine to exclude other acts evidence. Because the trial court did not abuse its discretion in excluding the challenged evidence, we affirm.

Defendant is charged with two counts of second-degree criminal sexual conduct, MCL 750.520c, based on sexual contact with his then 12-year-old granddaughter, and one count of aggravated indecent exposure, MCL 750.335a(2)(b), based on allegations that he masturbated in front of the complainant. As to the alleged sexual contact, the complainant testified during the preliminary examination that defendant touched her breasts with his hands under her clothes, that he had done so multiple times and that the touching started when she was five or six years old. She also testified that defendant touched her "crotch" under her clothes multiple times, "[l]ike a week, every week." As to the alleged indecent exposure, the complainant testified that she saw defendant touching his penis while he was on the computer when she was eleven or twelve, when he knew that she was watching.

Prior to trial, the prosecution filed a notice of intent to use other acts evidence under MCL 768.27a. The prosecution attached a 1989 police report concerning allegations of prior sexual abuse by defendant's then 16-year-old daughter. In the report, defendant's daughter alleged that defendant twice digitally penetrated her vagina, and had rubbed her clitoris. She also stated that he had repeatedly touched her breasts, buttocks, and genital areas during times when the two were wrestling, and when he had massaged her back. She also alleged that he had repeatedly walked in on her while she was unclothed and also had arranged to expose himself to her when he was bathing. Although defendant allegedly admitted digitally penetrating his daughter, and also acknowledged some of the other actions to a police officer during an interview, criminal charges were not filed.

Defendant subsequently filed a motion in limine seeking to bar introduction of the other acts evidence on the ground that the evidence was unduly prejudicial and would improperly lead a jury to convict defendant not on the evidence concerning the alleged instant acts but on defendant's prior alleged abuse of his daughter. In an opinion and order, the trial court found that, while the prosecution maintained the evidence was admissible under MCL 768.27a, the court was nevertheless required to perform a balancing test under MRE 403 before admitting this evidence under the statute. The trial court then noted that the 1989 police report set forth facts of a long pattern of sexual abuse by defendant against his daughter, which included multiple alleged penetrations. It found that:

Should this evidence be presented to the jury, it is highly probable that the jury would not be able to separate the two cases and would likely decide the case based on emotional impact rather than logical reasons. Thus, this evidence does not survive the balancing test of MRE 403 and is not admissible.

The Court also finds that it would be fundamentally unfair and a violation of due process to force the Defendant to defend accusations from over 20 years ago for which charges were never filed. The Defendant is in an untenable position to try to disprove more serious and greatly dated charges. It is unlikely that he would be able to do so, and to require him to do so would be manifestly unjust.

The prosecution filed its application for leave to appeal on May 20, 2010, and the trial court granted a motion to stay. This Court subsequently granted the prosecution's application for leave to appeal.

The prosecution first argues that the trial court abused its discretion in applying the MRE 403 balancing test to evidence that was admissible under MCL 768.27a. The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Plumaj*, 284 Mich App 645, 648; 773 NW2d 763 (2009) (internal quotation marks and citation omitted). However, "[w]hen the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

MCL 768.27a provides:

(1) Notwithstanding section 27,¹ in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that

¹ MCL 768.27 provides:

the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

(2) As used in this section:

(a) “Listed offense” means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.

The purpose of MCL 768.27a is to broaden the range of evidence admissible in criminal sexual offense cases involving minors. *People v Smith*, 282 Mich App 191, 204; 772 NW2d 428 (2009). Evidence admissible under the statutory standard need not also satisfy the rule of evidence as to the admissibility of bad acts evidence, *People v Watkins*, 277 Mich App 358, 364; 745 NW2d 149 (2007), and evidence admissible under the rule of evidence need not also satisfy the statutory standard, *Smith*, 282 Mich App 205-206.

In *People v Pattison*, 276 Mich App 613, 620-621; 741 NW2d 558 (2007), this Court stated that even when the evidence is admissible under MCL 768.27a, a trial court has the duty to weigh the probative value of the evidence against its prejudicial effect:

In cases involving sexual abuse of minors, MCL 768.27a now allows the admission of other-acts evidence to demonstrate the likelihood of a defendant’s criminal sexual behavior toward other minors. Although we find this information extraordinarily pertinent to a given defendant’s behavior in a similar case, we caution trial courts to take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case before admitting the evidence. See MRE 403. In this case, the trial court did not abuse its discretion in allowing the evidence under MCL 768.27a at the pending trial.

While recognizing *Pattison*’s holding, the prosecution cites to an order by a panel of this Court and an unpublished opinion to maintain that defendant incorrectly argues that there is no conflict

In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

of authority regarding the application of MRE 403 to MCL 768.27a, and to support its argument that MCR 403 is inapplicable to evidence admitted under MCL 768.27a. However, we note that both of the cases to which the prosecution cites involve unpublished orders and opinions that are without precedential value, and the latter did not properly consider *Pattison*, which we are required to follow. MCR 7.215(J)(1). Thus the trial court did not err when it considered whether the evidence was properly admissible under MRE 403.

The prosecution also argues that the evidence is properly admissible under MRE 403. In making this determination, the trial court should consider that MCL 768.27a reflects a legislative finding that in sexual assault cases involving minors, evidence showing a predatory history of certain defendants is relevant to a finding of guilt, *Smith*, 282 Mich App at 205, and the fact that this Court has found such evidence “extraordinarily pertinent” when the acts are similar. *Pattison*, 276 Mich App at 621.

Unfair prejudice does not mean any prejudice, but refers to “the tendency of the proposed evidence to adversely affect the objecting party’s position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, sympathy, anger, or shock.” *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994) (quotation omitted). Here, the trial court found that the prejudicial impact of the evidence outweighed its probative value because (1) the prior offense involved more serious allegations of abuse than the instant case, (2) it was highly probable that if the evidence were admitted, defendant would be convicted based on the emotional impact of that evidence rather than logic or the evidence of defendant’s guilt of the instant offense, and (3) it would be fundamentally unfair to require defendant to defend himself against 20-year-old accusations where no charges were filed in that case. The trial court provided a reasoned basis for its decision, and it was supported by the evidence that the prosecution seeks to present. Even given the fact that the evidence is relevant because the past conduct also involves a family member, it is highly likely that the jury would convict defendant solely based on his past conduct out of inflamed passion, anger or shock. In addition, because the prior conduct did not result in a conviction or even in the filing of charges, the trial court correctly observed that the necessary presentation of this evidence concerning the earlier alleged conduct would not only overshadow the question of defendant’s guilt that is directly at issue in the instant case, it would be virtually impossible for defendant to defend himself against the earlier unproven allegations.² The question is close. However, “[a]s we have often observed, the trial court’s decision on a close evidentiary question . . . ordinarily cannot be an abuse of discretion.” *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). The trial court did not choose an outcome that falls outside the range of reasonable and principled outcomes under the circumstances, and thus we find that it did not abuse its discretion in excluding the evidence.

² We recognize that there is evidence that defendant conceded that he committed at least some improper conduct. However, to date no court has explored the circumstances surrounding defendant’s questioning, or any other reason that charges were not filed in the earlier case.

While the prosecution also argues that the evidence should also have been admissible under MRE 404(b), this does not help its position. Admission pursuant to MRE 404(b) also requires the same balancing of prejudicial impact and probative value. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). Therefore, even if the trial court were to find that the evidence was offered for a proper purpose under MRE 404(b), there is no reason to believe that the court would have reached a different decision regarding the prejudicial effect of the evidence under MRE 404(b) than it did under MRE 403.

Affirmed.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro